The Honorable Julie Spector
Hearing Date: January 4, 2019 at 9:30 am
Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Commissioner Eric Watness, as Personal Representative of the Estate of Charleena Lyles; Karen Clark, as Guardian Ad Litem on behalf of the four minor children of decedent,

Plaintiffs,

v.

The City of Seattle, a Municipality; Jason M. Anderson and Steven A. McNew, individually,

Defendants.

NO. 17-2-23731-1 SEA

PLAINTIFFS' OPPOSITION TO DEFENDANT OFFICERS' MOTION FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

Plaintiffs respectfully request that Defendant Officers' motion for summary judgment be denied in its entirety. Defendants claim that they had no duty to act reasonably when they chose to answer Charleena's burglary call with specific knowledge that she could be suffering from a mental illness which could lead her to acting violently. Defendants now attempt to relitigate whether the public duty doctrine applies to this case. The Court has already denied Defendants' previous motion to dismiss on the same legal issues. It is also clear that Charleena was suffering from a significant mental illness condition at the time of the incident such that she lacked the mental capacity to commit a felony, negating Defendants' affirmative defense on this issue.

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II. RELEVANT STATEMENT OF FACTS

As the facts of this case have been described to this Court numerous times, including but not limited to those introduced in Plaintiffs' Motion for Summary Judgment filed on December 7, 2018, Plaintiffs reincorporate and reallege by reference those pleadings, exhibits, and declarations. Additionally, Plaintiffs briefly note the following:

a. Charleena Lyles

Before her death at age 30, Charleena lived a difficult life. She grew up in a broken home, witnessed her mother being physically abused and was herself sexually abused both in childhood and adolescence. Charleena suffered from chronic homelessness. Her records reveal a history of depression that surged when Charleena's mother died at age 45 in 2005. As an adult, Charleena was repeatedly subject to domestic violence from her partners and had frequent contact with law enforcement. Charleena had difficulty caring for her four children, one of whom has Down's Syndrome.[1]

Charleena participated in limited mental health counseling. Multiple providers diagnosed her with major depressive disorder, PTSD, and adjustment disorder. Charleena also exhibited signs of paranoia, delusion, and psychotic features, including the belief that someone driving a green truck was following her, that her children were being targeted at school, and that people were breaking or going to break into her apartment. There were instances where for no evident reason she yelled about her phones being tapped and thought that "the baby" was "in on it," and that other residents of her apartment were whispering judgments and conspiring against her. Her paranoia was also reflected in statements made by her children, one of whom was reported to have said their apartment was "bugged" and that he was checking for cameras – thoughts

[1] See Declaration of Mark B. Whitehill filed under seal 12/7/18, ¶¶6-10.

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Charleena had expressed in the past. A social services staff member was concerned that Charleena was decompensating and that this was impacting her children.[2]

On May 27 or 28, 2017, Charleena had a confrontation with another resident at the apartment complex playground who had asked her to return his gaming unit to him. Charleena told him that she was not going to give anything to him until she got her "12 rolls of toilet paper." Charleena then went into her building and returned with a large kitchen knife. She brandished the knife for the children in the area to see and exclaimed, "Do you want to die the way my ex-boyfriend died?"[3]

On June 5, 2017, about two weeks before the shooting, Charleena called the police to report an assault. While at first she was cooperative, buzzing the officers into the building when they arrived, inviting them into her apartment, and answering their questions, at some point in the encounter her demeanor suddenly changed in a manner strongly suggestive of psychosis. She started waving a pair of scissors at the officers and refused their demands to put them down, all in the presence of her 4-year-old developmentally disabled daughter. She also said that she wanted to "morph into a wolf," spoke of "cloning" her daughter, and claimed that the police were "devils" and members of the Ku Klux Klan. After several minutes, Charleena eventually complied and sat down on the couch next to her daughter.[4]

b. June 18, 2017 Incident

The individual Defendants were aware of the June 5, 2017 incident when they responded to Charleena's burglary call just a couple weeks later on June 18, 2017.[5] Upon arriving at

[2] *Id*. ¶¶13-26. See also Declaration of Ed Moore Docket no. 220, Ex. 8.
[3] Whitehill Dec. ¶¶13-26. See also Docket no. 220 Moore Dec. Ex. 8.
[4] Whitehill Dec. ¶¶27-28.
[5] See Docket no. 220 Moore Dec. Ex. 3 Anderson Statement (pgs. 3 & 10); Ex. 4 McNew Statement (pgs. 3-4 & 20); Ex. 5 FIT Report (pg. 30).

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Charleena's apartment building, Officer Anderson ran a routine records check on the address.[6] That record included an Officer Safety Caution detailing the June 5, 2017 incident just weeks earlier, when Charleena had brandished and threatened officers with a large pair of scissors, and was felt by SPD officers to be suffering from mental illness.[7] As a result, Officer Anderson requested backup, i.e. Officer McNew.[8] Officer McNew was not TASER certified, but he had attended the 40-hour Crisis Intervention Training and several eight-hour courses of annual additional CIT training.[9] Officer Anderson told Officer McNew about the Officer Safety Caution.[10] Both officers knew that Ms. Lyles could pose a threat of physical violence and that she might also be in mental crisis.[11] The officers also knew that crisis intervention techniques were used to end the earlier incident.[12] They discussed this, and planned that they were "not gonna let her get behind us or between us and the door."[13]

Officer Anderson was certified to carry a TASER and had been issued an Axon X2.[14] Part of Officer Anderson's specific training regarding the use of his TASER included what to do when confronted with suspects who threatened officers with knives or other sharp-edged objects.[15] TASER officers were trained that TASERs were "an effective force option against subjects who might be possessing potentially deadly weapons such as knives, heavy objects or clubs when the proper team tactics are used."[16] Yet Officer Anderson was not carrying his TASER when he responded to Charleena's burglary call, and had not done so for 1½ to 2 weeks

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[6] *Id.* Ex. 5 (pg. 30).
[7] *Id.* Ex. 3 (pgs. 3 & 10); Ex. 4 McNew Statement (pgs. 3-4 & 20); Ex. 5 (pg. 30).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* Ex. 3 (pg. 16).
[15] *Id.* Ex. 11 Deposition of Kerry Zieger (pgs. 32-34, 43-45, 47, 148-150, 152-153, 156-160).
[16] *Id.* Ex. 11 (pgs. 43-45).

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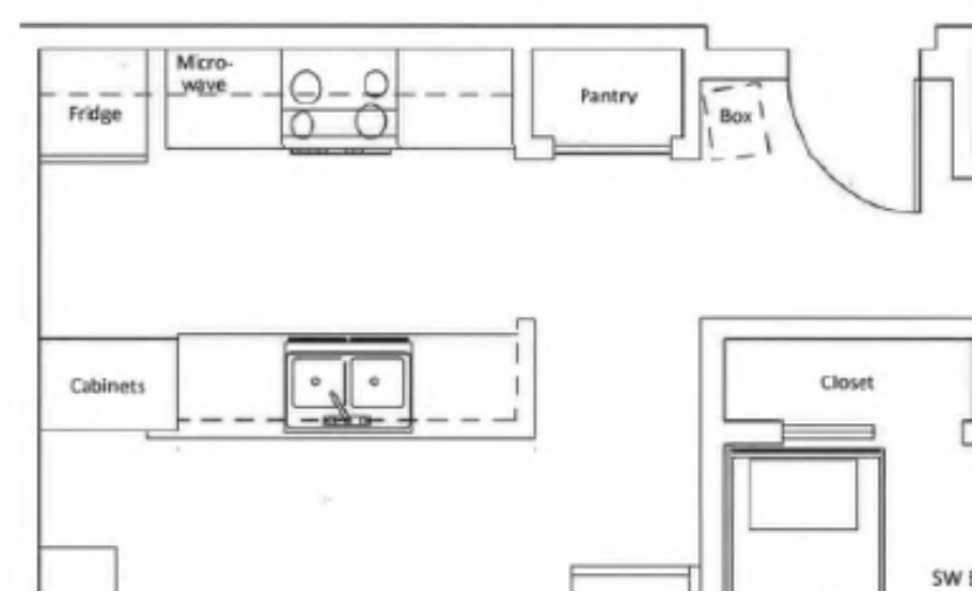
before the incident.[17] The TASER had stopped functioning, yet Officer Anderson did not report this to his superiors; he simply left it in his locker.[18] Officer Anderson did not tell Officer McNew that he did not have his TASER as they were planning how to approach Charleena on June 18, 2017; nor did he request a TASER officer who actually had a functioning TASER equipped.[19]

Despite the Officer's knowledge that Charleena could be suffering from a mental illness and could pose a threat of physical violence, their plan not to "let her get behind us or between us and the door," and Officer McNew's CIT training, Officer McNew became distracted and allowed himself to get trapped in Charleena's kitchen, a narrow part of the apartment with only one means of exit (pictured in the top left corner of the diagram below).[20]



Rather than keeping an eye on Charleena and his position relative to hers, Officer McNew was "standing in the kitchen looking noting [sic] old pans of food, listening to Officer

[17] *Id*. Ex. 3 (pg. 16).
[18] *Id.*
[19] *Id.* Ex. 3 (pgs. 3 & 10); Ex. 4 (pgs. 3-4 & 20); Ex. 5 (pg. 30).
[20] *Id*. Ex. 3 (pgs. 4-5); Ex. 4 (pgs. 5-6); Ex. 5 (pgs. 31-33).

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Anderson conducting his burglary investigation."[21] It was then that Officer McNew "heard a commotion," looked up, and saw that Charleena had brandished a knife.[22] That "commotion" Officer McNew heard was Charleena pulling a knife out of her pocket, lunging at Officer Anderson standing near the entrance to the apartment, Officer Anderson dodging out of the way, and Charleena backing up into the living room area.[23] Before then, Charleena had been cooperative and calmly answering questions, when suddenly her calm, non-threatening, nonchalant demeanor changed to yelling and grimacing, her body tensed and her muscles tightened – much like what had happened to her just two weeks before when she pulled scissors on the other SPD officers.[24]

At this point, Officer McNew was in the narrow kitchen, and Officer Anderson was near the front door of the apartment, with Charleena in the living room, with the kitchen counter partially blocking Charleena from Officer McNew (see diagram above).[25] While Officer Anderson claims the apartment door was closed,[26] video surveillance demonstrates that the door was open, as he was seen outside the apartment in the hallway when he was firing his weapon.[27] Had Officer McNew not been distracted – had he been paying attention to Charleena and his position relative to her – he could have noticed Charleena's change in demeanor before he "heard a commotion," and both he and Officer Anderson could have been able to retreat out the open front door, rather than be cornered by Charleena. That did not happen.

[21] *Id.* Ex. 5 (pg. 31-33).
[22] *Id*. Ex. 4 (pgs. 5-6); Ex. 5 (pgs. 31-33).
[23] *Id*. Ex. 3 (pgs. 4-5); Ex. 4 (pgs. 5-6); Ex. 5 (pgs. 31-33).
[24] *Id*.
[25] *Id.*
[26] *Id.* Ex. 3 (pg. 14).
[27] *See* Declaration of Ed Moore, In support of Plaintiffs' Opposition Ex. A (screenshot of hallway video surveillance).

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Both Officers drew their weapons, and Officer McNew yelled to Officer Anderson "Taser," but Anderson responded that he did not have his.[28] It was only after this exchange that both officers fired, killing Charleena.[29]

c. Seattle Police Department Policy

SPD's Manual describes the City's core use of force principles and policies. According to those policies, the community expects and the Seattle Police Department requires that officers use only the force necessary to perform their duties and that such force be proportional to the threat or resistance of the subject under the circumstances.[30] When safe under the totality of the circumstances and time and circumstances permit, officers shall use de-escalation tactics in order to reduce the need for force.[31] Conduct prior to the use of force is a factor which can influence the level of force necessary in a given situation.[32] Officers should take reasonable care that their actions do not precipitate an unnecessary, unreasonable, or disproportionate use of force, by placing themselves or others in jeopardy, or by not following policy or training.[33] Officers should continually assess the situation and changing circumstances, and modulate the use-of-force appropriately.[34] Officers shall only use such force that is objectively reasonable, necessary, and proportionate.[35] Officers are to use physical force only when no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to affect a lawful purpose.[36] The level of force must be appropriate for the circumstances, including the risks to officers or

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[28] Docket No. 220 Moore Dec. Ex. 3 (pgs. 4-5); Ex. 4 (pgs. 5-6); Ex. 5 (pgs. 31-33).
[29] *Id.*
[30] *Id.* Ex. 2 SPD Manual, § 8.000 (pg. 279-281).
[31] *Id. See also* § 8.100 (pg. 285-286).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at § 8.200 (pg. 287-288).
[36] *Id.*

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others.[37] The force used must moreover comply with SPD "policies, training, and rules for specific instruments and devices."[38]

The SPD equips its officers with "less-lethal devices," which are used to interrupt a subject's threatening behavior so that officers may take physical control of the subject with less risk of injury to the subject or officer than posed by greater force applications.[39] One such less-lethal device is the CEW/Conducted Electrical Weapons (TASER).[40] Officers who have been trained and certified to carry a TASER and have been issued one must carry it during their shift.[41] Officer Anderson was certified to carry a TASER and was issued an Axon X2.[42]

d. Violation of police practices

Police practices experts D.P. Van Blaricom and Thomas P. Mauriello both reviewed evidence in this case, including the SPD Manual and various accountings of the above referenced incidents.[43] Mr. Van Blaricom opined that the acts and omissions of both officers were unreasonable, failed to exercise the appropriate standard of care, and were a cause of the shooting and death of Charleena, including:

- Knowing, based on the June 5, 2017 incident involving other SPD officers, that Charleena could pose a threat of physical violence and might also be in mental crisis. "The officers clearly knew or should have known that they might be faced with lethal force or force sufficient to cause serious injury before they ever entered the apartment."[44]
- Officer Anderson failing to carry his mandated less-lethal weapon, an Axon X2 TASER, which he had a duty to wear pursuant to SPD policies.[45]

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[37] *Id.*
[38] *Id.*
[39] *Id.* at § 8.300 (pg. 290-304).
[40] *Id.*
[41] *Id.*
[42] Docket no. 220 Moore Dec. Ex. 3 (pg. 16).
[43] See Declarations of Thomas Mauriello and D. P. Van Blaricom Docket No. 226 and 227
[44] Van Blaricom Dec. ¶¶7, 12.
[45] *Id.* ¶¶8-9, 12.

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- Both officers failing to comply with SPD TASER policy and training, under which they should have requested a TASER officer who actually had a TASER, and used the TASER training techniques to respond to the call. This "constitute officer-created jeopardy which helped to precipitate the events that led to the shooting."[46]

Mr. Van Blaricom further found, more probably than not, that a response with a TASER would have provided an effective less lethal option, and that more probably than not the fatal shooting could have been avoided.[47]

Mr. Mauriello similarly opined that the shooting was unreasonable, represented a failure to exercise the degree of skill, care, diligence, and learning that would be expected of a reasonable police officer under the same or similar circumstances, and were a cause of the shooting and death of Charleena, because:

> Lyles allegedly threatened officers with a knife in her apartment[.] The officers did not have a TASER, but both had batons. The officers here opened fire once McNew discovered that there was no TASER. There were two officers. They were both substantially larger and stronger than the diminutive Ms. Lyles. Anderson could have instantly shifted his position [from] the entryway into the apartment into the internal hallway so that the officers were on either side of her. If she was actually approaching either officer as alleged, it would have been a simple matter for the officer behind her to tackle her and take her to the ground. Both officers were equipped with batons and either could have used the baton to deflect any knife she may have had while the other one took her to the ground. This most likely could have been done with no or minimal injury to her or the two officers.[48]

Mr. Mauriello further noted that this shooting was unreasonable due to the risk of hitting the children who were in close proximity.[49]

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[46] *Id.* ¶¶10, 12.
[47] *Id.* ¶¶11, 12.
[48] Mauriello Dec. ¶¶7, 8. Docket No. 226
[49] *Id.*

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e. Charleena's mental state

After the shooting, Dr. Whitehill performed a "psychological autopsy" on Charleena to assess her mental state during the encounter. He reviewed evidence in this case, including the various accountings of the above incidents and Charleena's mental health records. Based on his review, Dr. Whitehill opines that Charleena had suffered from serious and long-standing mental illness. Dr. Whitehill believes she suffered a psychotic break that precluded her from having the capacity to intend to assault the officers. Specifically, Dr. Whitehill states:

> 42. The evidence reviewed here strongly supports the notion that Ms. Lyles had decompensated markedly and was in a psychotic state when she brandished a knife. The suddenness and extent of her transformation from calm to aggressive, from helpful to threatening, is also consistent with a severe reaction to trauma unrelated to the present circumstances.
>
> 43. Persons in a severely decompensated state have distorted perceptions, judgment and/or decision-making. Ms. Lyle's behavior at the relevant time – as reported by both officers – reflects profound deficits in each of these areas. Her perception of the officers as helpful and responsible had changed markedly; one may even question whether she continued to perceive them as officers (as opposed to some darker atavistic abuser). It is also arguably true that her judgment and decision-making were markedly compromised in brandishing a knife in the presence of two armed officers.
>
> 44. As a result of these deficits, despite significant evidence of Ms. Lyles' capacity for intentional conduct in advance of her sudden decompensation (e.g. buzzing the officers into her apartment, calmly answering questions about the alleged burglary, etc.) Ms. Lyles did **not** have the capacity to intend to assault during her psychotic break. While her conduct as described while brandishing the knives suggested the *appearance* of assaultive capacity, her debilitated mental state, in which she arguably did not know what she was doing, rendered such capacity absent.[50]

III. ISSUES

1. Should the Defendants be denied summary judgment on the issue of no duty?

[50] See Whitehill Dec. filed under seal 12/7/18

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2. Should the Defendants be denied summary judgment on Defendants' affirmative defense of felony defense?

IV. EVIDENCE RELIED UPON

This response is based on the following documentary evidence:

1. Declaration of Thomas Mauriello docket no. 226;
2. Declaration of D.P. Van Blaricom docket no. 227;
3. Declaration of Mark B. Whitehill filed under seal 12/7/18;
4. Declaration of Edward H. Moore docket no. 220;
5. Declaration of Edward H. Moore filed with this Opposition;
6. All pleadings and other documents on file herein including, but not limited to, Plaintiffs' third amended complaint and the Defendants' answers.

IV. AUTHORITY/ARGUMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. v. Blume Dev. Co.,* 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In determining whether a genuine issue of material fact exists, the Court must view all facts and draw all reasonable inferences in favor of the nonmoving party, in this case the Defendant. *Owen* v. *Burlington N. Santa R.R. Co.,* 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

Defendant bears the burden of proving its affirmative defenses at trial. With respect to those defenses, a plaintiff moving for summary judgment can meet their burden by pointing out

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to the trial court that the nonmoving party lacks sufficient evidence to support its affirmative defenses. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (Div. 1 1993) (citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)). The burden then shifts to the nonmoving party to produce evidence to support its defenses. *Young*, 112 Wn.2d at 225. The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain; rather they must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). If the party that will bear the burden of proof at trial fails to make a showing sufficient to establish the existence of an element essential to that party's claim or defense, then the trial court should grant the motion. *Young*, 112 Wn.2d at 225. Absent such evidence, there is no genuine issue of material fact, and summary judgment must be granted dismissing the affirmative defense as a matter of law. CR 56(c).

Defendants are not entitled to summary judgment on either of the two grounds in their motion. They have failed to raise genuine issues of material fact, and the Plaintiffs' expert declarations establish both negligence and causation.

1. Defendants Officers were negligent in their tactics and confrontation with Charleena resulting in the unjustified and unnecessary death.

Defendant Officers attempt to relitigate their failed arguments regarding the public duty doctrine brought before the court earlier this year. The public duty doctrine does not provide immunity from liability, and the "public duty" analysis is not triggered simply because the defendant happens to be a government agency or entity. *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). Washington courts "have almost universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff's lawsuit." *Bailey v. Town of Forks*, 108 Wn.2d

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262, 266, 737 P.2d 1257 (1987). Municipal corporations are liable for damages arising out of their tortious conduct, or the tortious conduct of their employees, to the same extent as if they were a private person or corporation. RCW 4.96.010(1); *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012); *Mancini v. City of Tacoma*, 188 Wn. App. 1006 (Div. 1, 2015) (unpublished).

i. Police officers have a common law duty to avoid the foreseeable consequences of their actions

Police officers have a common law duty to avoid the foreseeable consequences of their actions. "The distinction between mandated duties and common law duties is important because duties imposed by common law are owed to all those foreseeably harmed by the breach of the duty." *Munich*, 175 Wn.2d at 891; *Mancini*, 188 Wn. App. at *8. The only governmental duties the Washington Supreme Court has limited under the public duty doctrine are those legal obligations imposed by a statute, ordinance, or regulation:

> Since its inception, the "public duty" analysis has remained largely confined to cases in which the plaintiff claims that a particular statute has created an actionable duty to the "nebulous public." Although we could have been clearer in our analyses, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation. This court has never held that a government did not have a common law duty solely because of the public duty doctrine.

Munich, 175 Wn.2d at 886-87 (Chambers, J.) (five-justice majority concurrence).

It is clear under *Munich* that the public duty doctrine does not apply to common law duties that the Defendant Anderson and McNew owed to Charleena.

ii. Police officers have a duty to avoid negligence when they takeaction that creates an increased risk of harm

Specifically, the common law duty the officers owed to Charleena was the duty to act without negligence once they chose to take affirmative action that created an increased risk of

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harm. Alternatively stated, where government officers act, they must avoid misfeasance. "Under common law, a defendant owes a plaintiff the duty to exercise reasonable care if (1) the defendant, by act or misfeasance, poses a risk of harm to the plaintiff, as where the defendant actively creates or increases peril and exposes the plaintiff to it; or (2) the defendant, by omission or nonfeasance, fails to prevent harm to the plaintiff despite an obligation to do so, as where the defendant passively tolerates peril after voluntarily assuming responsibility to protect the plaintiff from it." *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 84, 328 P.3d 962 (2014); *See Robb v. City of Seattle*, 176 Wn.2d 427, 436–37, 295 P.3d 212 (2013); 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 2:2, at 37–38 (4th ed.2013).

Cases involving misfeasance do not implicate the public duty doctrine and the exceptions are not relevant. When public officials "*do* act, they have a duty to act with reasonable care," and the public duty doctrine does not bar claims for negligence." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 758, 310 P.3d 1275 (2013); *Robb*, 176 Wn.2d at 436-7; *Coffel v.Clallam County,* 47 Wn. App. 397, 403-04, 735 P.2d 686 (1987). In *Coffel,* plaintiffs sued Clallam county and local police officers for failure to prevent the destruction of plaintiffs' building and business premises. In reversing summary judgment as to those officers and Clallam County, the appellate court rejected the suggestion that the public duty doctrine applied to the claims against them:

> **The doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care.**

Id. at 403. (Emphasis added)

Similarly, in *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007), the court held that a duty arose because the government official's affirmative acts increased the plaintiffs' foreseeable harm. In that case, a Metro bus driver left a bus running with keys in the ignition and

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the bus was seized by an occupant high on PCP, who drove off, injuring several people. The Washington Court of Appeals analyzed the Parrillas' suit under *Restatement (Second) of Torts* §302B, which provides that "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." Based on Washington precedent and the Restatement (Second), the court found that the county had a duty to protect individuals like the Parrillas from the third party's foreseeable criminal acts. *Id*. at 433-41. The Court of Appeals found the duty arose because the bus driver's affirmative acts exposed the Parrillas to foreseeable harm at the third-party criminal's hands. *Id*. at 438-39. Specifically, the Court of Appeals found the driver had acted affirmatively by getting off the bus and leaving a dangerous situation behind.

The Washington Supreme Court's decisions in *Robb* and *Washburn* have reaffirmed Washington precedent holding that the public duty doctrine is not triggered in cases of misfeasance, such as this. Although the Supreme Court concluded that *Robb* was a nonfeasance case, and thus not subject to § 302B, it recognized § 302B as an independent basis for a duty. *Robb,* 176 Wn.2d at 429. The court reinforced the *Robb* holding in *Washburn*. In *Washburn*, the Supreme Court held that an officer who served an anti-harassment order had a duty to act reasonably in the service of that order, so as not to expose a third party to criminal behavior. *Washburn*, 178 Wn.2d at 759.

The public duty doctrine does not bar liability when the officers owe common law duties and their conduct involves misfeasance. Once an officer acts with regard to an individual, he or she has a duty to act reasonably to avoid a risk of harm to that individual. *Washburn*, 178 Wn.2d at 758; *Robb*, 176 Wn.2d at 436-7; *Mita* 182 Wn. App. at 84; *Coffel*, 47 Wn. App. at 403-404.

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Plaintiffs' main contention here is that the officers approached a mentally ill woman with foreknowledge and essentially precipitated, created and allowed Charleena's alleged attack on the officers. *Accord, Hayes v. County of San Diego*, 57 Cal. 4th 622, 626, 305 P.3d 252, 160 Cal. Rptr. 3d 684 (2013). *See e.g., Reed v. District of Columbia*, 474 F. Supp. 2d 163, 173-174 (2007) (negligence claim submitted to jury in wrongful death shooting claim against police officer where a "distinct act of negligence, a misperception of fact, may have played a part in the decision to fire."); *see also LaBauve v. State*, 618 So.2d 1187, 1190 (La. App. 1993) (trial court did not err in allowing negligence claim against police officer where officer pushed 76-year-old man onto rocks and gravel in course of arrest); *Picou v. Terrebonne Par. Sheriff's Office Through Rozands*, 343 So. 2d 306, 308 (La. Ct. App. 1977).

Officer Anderson's affirmative action began when he decided to respond to Charleena's burglary call. It did not begin when both Officers knocked on Charleena's door. Defendants claim that Plaintiffs are without recourse because Plaintiffs' have claimed negligence in regards to the Defendant's "pre-contact," but they have cited no caselaw that supports their position. *Donaldson* is a public duty doctrine case that focuses on the statutory duties alleged to have been violated including the failure to investigate. *Donaldson v. City of Seattle*, 65 Wn. App 661, 675, 831 P.2d 1098 (1992). Plaintiffs have never claimed to rely on statutory duties or a failure to investigate. Plaintiffs' claims are based upon common law negligence and not Plaintiffs have consistently claimed that the Officers acted negligently in their tactics, planning and execution of the interaction with Charleena.[51] They affirmatively acted and once they did so, they had a common law duty to Charleena to act reasonably. *Robb,* 176 Wn.2d at 429; *Washburn*, 178 Wn.2d at 759. In California, the California Supreme Court recently held that tactical conduct and

[51] See VanBlaricom and Mauriello Decs. Docket No. 227 and No. 226

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decisions preceding an officer's use of deadly force are relevant considerations in determining whether the use of deadly force gives rise to negligence liability. State negligence law, which considers the totality of the circumstances surrounding any use of deadly force (*see Grudt v. City of Los Angeles*, 2 Cal. 3d 575, 585-588, 468 P.2d 825, 829, 86 Cal. Rptr. 465, 469 (1970)) is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used (*see Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002)). Liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable. *Hayes*, 57 Cal. 4th 622. Peace officers have a duty to act reasonably when using deadly force, a duty that extends to the totality of circumstances surrounding the shooting, including the officers' pre-shooting conduct. *See Hayes*, 57 Cal. 4th at 688-691.

Defendants' own policies and procedures explicitly acknowledge this duty. SPD's Manual notes that conduct prior to the use of force is a factor which can influence the level of force necessary in a given situation, and that officers should take reasonable care that their actions do not precipitate an unnecessary, unreasonable, or disproportionate use of force, by placing themselves or others in jeopardy, or by not following policy or training.[52] Yet Defendants now seek to ignore these responsibilities by drawing an artificial and unsupported delineation between "pre-contact" and "post-contact" conduct.

The cases Defendants cite are all either nonbinding on this Court or do not properly apply the analysis above. *State v. Ray,* 116 Wn.2d 531, 544, 806 P.2d 1220 (1991) ("federal law does not bind this court")*; State v. Brown,* 113 Wn.2d 520, 547–48, 782 P.2d 1013 (1989) (same).

2. Defendants cannot prove their affirmative defense based on RCW 4.24.420 because Charleena lacked the capacity to form the intent necessary to

[52] See Docket No. 220 Moore Dec. Ex. 2 SPD Manual § 8.100.

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commit felony.

Defendants claim that Plaintiffs' claims are barred under RCW 4.24.420[53] because Charleena was committing three felonies:

- first degree assault by attacking Officers Anderson and McNew with a deadly weapon, citing RCW 9A.36.011(1);
- attempted murder, citing RCW 9A.28.020(1), (3); and
- third degree assault, citing RCW 9A.36.031(1)(g).

Def's Mtn. pg. 19-20. Defendants' claims fail because all of these crimes require specific intent, and Defendants cannot prove Charleena was capable of forming that intent.

In order to commit an assault, a person must have the specific intent to cause bodily harm or to create an apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (emphasis added); *State v. Williams*, 159 Wn. App. 298, 307, 244 P.3d 1018 (2011). First degree assault requires that a person act "with intent to inflict great bodily harm." RCW 9A.36.011(1). Attempted murder requires that a person act "with intent to commit a specific crime." RCW 9A.28.020(1). Even where intent is not required by statute, intent is a non-statutory element of assault, including third degree assault on a law enforcement officer under RCW 9A.36.031(1)(g).[54] *State v. Finley*, 97 Wn. App. 129, 982 P.2d 681, 685 (1999), *review denied*, 139 Wn.2d 1027, 994 P.2d 845 (2000) (citing *State v. Brown*, 94 Wn. App. 327, 972

[53] RCW 4.24.240 provides:

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

[54] Some assaults only involve criminal negligence, and do not require specific intent. *See, e.g.,* RCW 9A.36.031(d), (f) (it is third degree assault to, with criminal negligence, cause bodily harm to another person by means of an instrument likely to produce bodily harm, or accompanied by substantial pain and considerable suffering). *See also State v. Coates*, 107 Wn.2d 882, 892–93, 735 P.2d 64 (1987) (evidence of defendant's voluntary intoxication cannot work in any way to negate or obviate mental state of criminal negligence). However, the assaults Defendants allege all have intent as a required element of the crime, and given the circumstances of this case, there does not appear to be any felony Defendants could allege Charleena was committing that lacked specific intent as an element.

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P.2d 112 (1999); *State v. Allen*, 67 Wn. App. 824, 826, 840 P.2d 905 (1992); WPIC 35.50). A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a).

Diminished capacity is a defense to any crime that includes an element of intent. Proof of diminished capacity requires: (1) the crime charged must include a particular mental state as an element; (2) the accused must present evidence of a mental disorder; and (3) expert testimony must logically and reasonably connect accused's alleged mental condition with the asserted inability to form the mental state required for the crime charged. *See* WPI 18.20 (citing *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001); *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); *State v. Griffin*, 100 Wn.2d 417, 418–19, 670 P.2d 265 (1983); *State v. Guilliot*, 106 Wn. App. 355, 363, 22 P.3d 1266 (2001)).

Lay witness testimony, such as the observations of the officers at or close to the time the alleged offense occurred, is admissible. *State v. Stumpf*, 64 Wn. App. 522, 526, 827 P.2d 294 (1992). However, expert testimony is required to establish the existence of the alleged mental disorder, as well as how the disorder impaired the accused's ability to form the required mental state. *Atsbeha*, 142 Wn.2d at 914; *Stumpf*, 64 Wn. App. at 526.

Although the Supreme Court has described diminished capacity as an "affirmative defense," *State v. Eakins*, 127 Wn.2d 490, 496, 902 P.2d 1236 (1995), it is more accurate to say that it "negates one of the elements of the alleged crime," *State v. Nuss*, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988), or "raise[s] a reasonable doubt as to the mental state element of the State's case." *State v. James*, 47 Wn. App. 605, 608, 736 P.2d 700 (1987) (involving "intoxication causing diminished capacity"). Accordingly, while the defendant in a criminal case may be tasked with producing evidence putting such a defense in issue, such evidence need only

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create reasonable doubt as to one of the elements of the crime; the "burden of proof" does not shift to the defendant. *See State v. W.R., Jr.*, 181 Wn.2d 757, 762-69, 336 P.3d 1134 (2014) (addressing the burden of proof in a case where consent necessarily negated the element of forcible compulsion). Defendants have raised RCW 4.24.420 as an affirmative defense and Defendants bear the burden of proving all elements of any claimed felony at trial.

Dr. Whitehill performed a "psychological autopsy" on Charleena to determine whether she had the capacity to form the requisite mens rea. Based on his review, Dr. Whitehill opines that Charleena had suffered from serious and long-standing mental illness. Dr. Whitehill believes she suffered a psychotic break that precluded her from having the capacity to intend to assault the officers. Specifically, Dr. Whitehill states:

> 42. The evidence reviewed here strongly supports the notion that Ms. Lyles had decompensated markedly and was in a psychotic state when she brandished a knife. The suddenness and extent of her transformation from calm to aggressive, from helpful to threatening, is also consistent with a severe reaction to trauma unrelated to the present circumstances.
>
> 43. Persons in a severely decompensated state have distorted perceptions, judgment and/or decision-making. Ms. Lyle's behavior at the relevant time – as reported by both officers – reflects profound deficits in each of these areas. Her perception of the officers as helpful and responsible had changed markedly; one may even question whether she continued to perceive them as officers (as opposed to some darker atavistic abuser). It is also arguably true that her judgment and decision-making were markedly compromised in brandishing a knife in the presence of two armed officers.
>
> 44. As a result of these deficits, despite significant evidence of Ms. Lyles' capacity for intentional conduct in advance of her sudden decompensation (e.g. buzzing the officers into her apartment, calmly answering questions about the alleged burglary, etc.) Ms. Lyles did **not** have the capacity to intend to assault during her psychotic break. While her conduct as described while brandishing the knives suggested the *appearance* of assaultive capacity, her debilitated mental state, in which

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she arguably did not know what she was doing, rendered such capacity absent.[55]

This diminished capacity means Charleena could not commit the crimes of felony assault or attempted murder, and Defendant's felony defense argument must fail. Summary judgment should not be granted on this ground.

Defendant claims that "Ms. Lyles' actions are not subject to misinterpretation," and that various actions or behaviors exhibited by her "demonstrated her intent," and that "she obviously heard the Officers command her to 'get back', decided not to 'get back', and instead proclaimed her intent to continue her attack." *Def's Mtn. pg. 18-19*. However, as demonstrated above, Dr. Whitehill considered the accounts by the officers of what transpired and concluded, in his expert psychological opinion, that Charleena did not have the capacity to form the necessary intent. While the officers may have concluded that Charleena had the *appearance* of assaultive capacity, they are not competent to opine whether she had that capacity in fact, and any such opinions on their part are pure conjecture. *See Atsbeha*, 142 Wn.2d at 914; *Stumpf*, 64 Wn. App. at 526 (expert testimony required). Defendants have failed to present any competent evidence supporting its affirmative defense. Absent such evidence, Defendants' affirmative defense must be dismissed. *See* CR 56(c); *Young*, 112 Wn.2d at 225; *Guile*, 70 Wn. App. at 21.

For these same reasons, Defendants' request for dismissal of the children's claims for negligent infliction of emotional distress must also be denied, as this argument is premised entirely on Charleena having committed a felony when the children's emotional distress was inflicted. So long as there a duty owed to Charleena, the children's claim is viable.

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[55] See Whitehill Dec. filed under seal 12/7/18

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VI. CONCLUSION

The Plaintiffs respectfully request that the court deny Defendants' motion for summary judgment and grant the Plaintiffs' motion.

A proposed order is submitted with the Motion.

DATED December 21, 2018

I certify that this memorandum contains less than 8,400 words in compliance with the Local Civil Rules.

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CERTIFICATION

I hereby certify that on December 21, 2018, I delivered a copy of the document to which this certification is attached for delivery to all counsel of record as follows:

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